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FILED
JUN 24 1994
OFFICE OF THE CLERK

No. 93-1938
In the Supreme Court of the United States
October Term, 1993

TRACY CECIL HAMMOND,

Petitioner,

v.

PAMELA WITHROW,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

FRANK J. KELLEY
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Arthur E. D'Hondt
Assistant Attorney General
Attorneys for Respondent

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QUESTION PRESENTED

WHETHER THE PETITION PRESENTS A FEDERAL CONSTITUTIONAL QUESTION COGNIZABLE BY A HABEAS COURT, OR MERELY ALLEGES THE STATE TRIAL COURT MADE AN ERRONEOUS EVIDENTIARY RULING WHICH, BY ITSELF, IS NOT A FEDERAL CONSTITUTIONAL ISSUE.

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STATEMENT OF THE CASE

Petitioner Tracy Cecil Hammond (Petitioner), who is incarcerated at a Michigan penal institution by virtue of a Michigan judgment of life imprisonment for his jury conviction of first degree murder, MCL 750.316; MSA 28.548, is seeking a writ of certiorari from the February 17, 1994 decision of the Sixth Circuit Court of Appeals, which affirmed the District Court's dismissal of Petitioner's habeas petition, and inter alia, held the trial court's evidentiary ruling at issue did not render Petitioner's trial fundamentally unfair, and, therefore, was not cognizable in a habeas case.

STATEMENT OF FACTS

Petitioner and his cousin, Mark Hammond, were charged with the October 21, 1987 murder of Cameron (Ron) Johnson, but tried separately.

At Petitioner's jury trial, Petitioner's statement to the police and the testimony of Carrie Johnson, the mother of the murder victim, Diane Richardson, who was Mark Hammond's girl-friend and at whose home the cousins were staying, and Karen Neganigijig established the following:

On Thursday evening, October 29, 1987, Mark Hammond and Petitioner discussed beating Johnson up to steal cocaine, marijuana and LSD at Diane Richardson's home, where they both were

staying. Mark Hammond stated they might have to kill Johnson to avoid any retribution and Petitioner claimed he told his cousin that he would go along with stealing from Johnson and beating him up, but he didn't want to kill Johnson. Later that night, Petitioner and his cousin drove to Johnson's apartment to make sure Johnson planned to meet them Friday evening (Trial Transcript, People v Hammond, Livingston Circuit Court File No. 87-5164 [TT] Vol 2 pp 283-286). Petitioner knocked on the Johnson's door until Carrie Johnson came to the door at approximately 11:47 p.m. Petitioner identified himself as "Jason" and said it was really important that he see her son (TT Vol 2 pp 241-242). When Petitioner returned to the vehicle they were using, Mark Hammond again mentioned killing Johnson (TT Vol 2 pp 285-287).

On Friday, October 30, 1987, between 4:30 and 5:30 p.m., Petitioner and his cousin went to a restaurant to talk to and invite Karen Neganigijig to a party that night. Prior to leaving the restaurant, Petitioner said "I am ready to kill someone" and his cousin said, "We have some business to take care of." (TT Vol 2 pp 402, 408).

Later, between 11:00 and 11:30 p.m. the night of October 30, 1987, Johnson telephoned Mark Hammond at Diane Richardson's home and Petitioner heard his cousin lying to Johnson about a big party, where Johnson could sell all of his drugs. Mark Hammond told Johnson that the cousins would pick Johnson up at his apartment in 15 minutes (TT Vol 2 pp 287-288).

Petitioner and his cousin met Johnson in Johnson's apartment parking lot, and convinced Johnson to place his drugs in the trunk in case they were stopped by the police. They then proceeded to drive Johnson into a rural area. Mark Hammond told Johnson he knew where there was a barn full of marijuana that they could steal, and they drove further into the country (TT Vol 2 pp 289-290, 313-314).

Sometime in the early morning hours of Saturday, October 31, 1987, Mark Hammond stopped their vehicle at an isolated rural church, and they all got out of the vehicle. Petitioner obtained a 2½ to 3 foot pipe from the trunk of the car which he called "Fred" and which he knew could inflict great damage as a

weapon, because he had tested it against a telephone pole and caused a half-inch dent in the pole without damaging the pipe. He also removed a piece of wood for his cousin. The cousins claimed that the pipe and wood were to break up the fictitious bales of marijuana. After some time, during which the cousins sent Johnson into an adjoining cornfield to see how much noise they would make walking to the fictitious marijuana barn, Mark Hammond said, "Ron, let's have the stuff", and Petitioner said, "Ron just make it easier on yourself, just give him the stuff." (TT Vol 2 pp 291-296).

Johnson was not very big, was kind of timid, and did not fight. Petitioner claimed in his statement that Johnson

bent down and came at Petitioner. Petitioner pushed Johnson once with his hand, and then hit Johnson in the head with his pipe "Fred", at least once and possibly twice. Johnson dropped to his knees from Petitioner's blow to his head with the pipe, "Fred", screaming in pain, and holding his head with his hands. Thereafter, Mark Hammond broke his piece of wood over Johnson's head and then borrowed Petitioner's pipe to continue to beat Johnson. The cousins left Johnson laying on the ground where he was discovered dead later that morning (TT Vol 2 pp 296-299, 304, 306-309).

When the cousins returned to Diane Richardson's home at between 3:00 to 3:30 a.m., Saturday, October 31, 1987,

Petitioner told Richardson he had really bopped him up and that "we might have killed him." (TT Vol 2 pp 310, 353, 361, 363, 368).

Later that day, Petitioner told his girlfriend "we may have killed somebody." (TT Vol 2 p 319).

On March 24, 1988, after the prosecutor rested, Petitioner's trial counsel stated Petitioner would present two witnesses (TT Vol 3 p 419). The prosecutor requested an offer of proof concerning the testimony of John Budd, because of the statements in Petitioner's opening statement (TT Vol 3 pp 469-470). Petitioner's trial counsel made the offer (TT Vol 3 pp 470-471), and the prosecutor made a motion in limine to bar John Budd's testimony (TT

Vol 3 p 479), which the trial court granted from the bench in an opinion providing in pertinent part:

> [t]hat testimony by one Mr. Budd would indicate that he, prior to the death of Ron Johnson, had had a relationship of a homosexual nature with Mark Hammond. That Mark Hammond was supplanted by Ron Johnson in some sort of a relationship with Mr. Budd, and that specifically Mark Hammond was supplanted in the will of Mr. Budd by Ron Johnson, thus allegedly giving Mark Hammond an additional motive to dispose of by death of Ron Johnson.
> (TT Vol 3 pp 480-481)
>
> * * *
>
> This Court believes it would be collateral to go on and show additional motive. We could go on forever and show additional motive Mark Hammond might have had to dispose of Ron Johnson.
>
> * * *
>
> If this jury convicts Tracy Hammond of first degree murder, it will be because they believe, it seems to me, that he premeditated the murder and that they disbelieve the story about, A, maybe self-defense; and, B, about him never intending in any manner to hurt the man.
> (TT Vol 3 p 482)

* * *

> It doesn't matter if Mark Hammond had an additional motive. That would not excuse this witness--or excuse me, this Defendant, if he had a motive that was not the same as Mark Hammond's, if he had been dubbed (sic) into believing that the reason for getting rid of this person was because he might retaliate or he was some sort of a bothersome witness perhaps in the future.
>
> Even if he were totally dubbed (sic) -- and that wasn't Mark Hammond's real reason--that doesn't matter. He can still be convicted of the motive that he may have had.
>
> And, indeed, I don't want to misstate myself there. Motive is not essential. He could be convicted of first degree because of the premeditation that he did do, for whatever reason. And that is where I think we start getting off into all kinds of collateral reasons, and I think that the matter would be confusing to the jury, collateral and not helpful in deciding this case.
> (TT Vol 3 p 483)

Petitioner was convicted by the jury of first degree murder later on March 24, 1988 (TT Vol 3 pp 572-574).

On April 11, 1988, the trial court held a hearing to preserve the testimony of John Budd, who testified as follows:

He had a homosexual relationship with Mark Hammond, who lived with Budd in Budd's home from November, 1986 to March, 1987. (April 11, 1988 Motion to Preserve Testimony Transcript, People v Hammond, supra, [PTT] pp 5-6, 10).

He made Mark Hammond the beneficiary in his will in the fall of 1986 (PTT pp 4, 11), but changed his will in March 1987, and made Cameron Johnson his beneficiary, because Mark Hammond mistreated him. (PTT pp 5, 15-16).

He told Mark Hammond of the change of beneficiary in his will, when Mark Hammond moved out of Budd's house in March 1987. (PTT pp 5, 11-12, 15-16).

He moved to Florida in April 1987, and Mark Hammond visited him for 10 days in September 1987, and shot him in the hand with a gun when he left.

On July 6, 1990, the Michigan Court of Appeals affirmed Petitioner's conviction in People v Hammond, Michigan Court of Appeals File No. 109359 and, inter alia, held:

> In this case, we find no abuse of discretion on the part of the trial court in refusing to allow John Budd to testify. In a post-trial motion to preserve his testimony, Budd testified that he removed Mark Hammond from his will and replaced him with the victim, Cameron Johnson. This testimony was primarily offered to show that Mark Hammond had a motive to kill Johnson. However, evidence of Mark Hammond's intent or motive to kill Johnson is irrelevant where, as here, Mark Hammond was tried before a separate jury. MRE 402.

On March 8, 1993, United States District Judge Benjamin F. Gibson

entered a judgment in the above cause, dismissing Petitioner's habeas petition, and adopting as the opinion of the Court the February 16, 1993 Report and Recommendation of United States Magistrate Judge Hugh W. Brenneman, Jr. The District Court's adopted opinion stated:

> Despite petitioner's argument that the absence of Mr. Budd's testimony rendered the trial fundamentally unfair and a violation of due process, what petitioner is attempting to do is have this court make an evidentiary ruling. The purpose of this habeas court is not to determine the validity of a state court's evidentiary holding. State court rulings on the admissibility of evidence may not be questioned in a federal habeas corpus proceeding unless they raise a federal constitutional question. Bell v. Arn, 536 F.2d 123, 125 (6th Cir. 1976).
>
> Due process requires that a defendant be permitted to present witnesses who will establish a defense. Washington v. Texas, 388 U.S. 14, 19 (1967). However, Mr. Budd's testimony was being offered to plant a seed in the minds of the jurors that

> Mark Hammond had a motive to kill Ron Johnson that was different from the petitioner. But the motive of Mark Hammond was irrelevant. The relevant issue was whether petitioner had the requisite intent to kill Ron Johnson, regardless of whether Mark Hammond did or did not also have a motive.
> (R & R, p 6).

On February 7, 1994, the Sixth Circuit Court of Appeals issued its decision affirming the District Court's dismissal of Petitioner's habeas petition.

REASONS FOR DENYING THE WRIT

THE PETITION DOES NOT PRESENT A FEDERAL CONSTITUTIONAL QUESTION, OR ANY IMPORTANT UNSETTLED QUESTION OF FEDERAL LAW AND THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OF OTHER UNITED STATES COURTS OF APPEALS.

Petitioner does not and cannot establish that this case involves a federal constitutional question, any important unsettled questions of federal law or that the decision below conflicts with decisions of this Court or other United States Courts of Appeals. This case merely involves a state court evidentiary ruling, which is not cognizable by a habeas court.

THE PETITION DOES NOT PRESENT A FEDERAL CONSTITUTIONAL QUESTION COGNIZABLE BY A HABEAS COURT, BUT MERELY ALLEGES THE STATE TRIAL COURT MADE AN ERRONEOUS EVIDENTIARY RULING WHICH, BY ITSELF, IS NOT A FEDERAL CONSTITUTIONAL ISSUE.

The Sixth Circuit Court of Appeals recognized that the critical initial question presented by Petitioner's claim that the trial court erred in ruling John Budd's proposed testimony was inadmissible was whether the claim presented a federal constitutional issue, because nonconstitutional claims are not cognizable in a federal habeas proceeding, 28 USC § 2241(C)(3); 28 USC § 2254(a); Smith v Phillips, 455 US 209, 221 (1982); Rose v Hodges, 423 US 19, 21 (1975) (per curiam); Estelle v McGuire, 502 US ___, 112 S Ct 475, 480 (1991), evidentiary rulings of state courts are

not cognizable by habeas courts, unless the ruling rendered the trial fundamentally unfair, Lundy v Campbell, 888 F2d 467, 469-470 (6th Cir, 1989) cert den, 110 S Ct 1212 (1990), and habeas relief may not be based on a perceived error of state law, Pulley v Harris, 465 US 37, 41 (1984); Lewis v Jeffers, 497 US 764, 780 (1990); Estelle, supra.

The Sixth Circuit Court of Appeals correctly, and thoroughly but succinctly ruled that Petitioner's claim concerning the trial court's evidentiary ruling that John Budd's testimony was inadmissible was not cognizable by a habeas court as follows:

> Respondent argues that petitioner is attempting to have this court review a state court evidentiary ruling on the admissibility of evidence, which does not raise a federal constitutional question, and thus is not reviewable in a habeas corpus

petition. Bell v. Arn, 536 F.2d 123, 125 (6th Cir. 1976).

We agree. The admissibility of the evidence at issue does not raise a federal constitutional question because it did not violate petitioner's due process right to present a defense. The issue before the jury was whether the petitioner had the intent to kill Ron Johnson. The relevant question was not whether Mark Hammond had a motive and whether that motive was shared by petitioner, but whether petitioner had a motive as two co-defendants can clearly have distinct motives for committing a crime. Whether Mark Hammond may have had a different motive to kill the victim does not tend to prove or disprove whether petitioner also had a motive and the requisite intent to commit the crime. Even if Mark Hammond had a different unexpressed motive to kill Ron Johnson to get revenge for being replaced by Johnson in Budd's will, this motive would not disprove that petitioner also had the intent to kill and premeditated the murder. To conclude, we find that evidentiary rulings of state courts are not cognizable in habeas corpus cases unless the trial was rendered fundamentally unfair, which did not occur in the present case. Lundy v. Campbell, 888 F.2d 467, 469-470 (6th Cir. 1989), cert. denied, 110 S. Ct. 2212 (1990). The district court is affirmed on this issue.
(pp 7-8).

RELIEF SOUGHT

Petitioner has not and cannot establish that the above holding is erroneous or that a writ of certiorari should be issued.

WHEREFORE, Respondent urges this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Arthur E. D'Hondt
Assistant Attorney General
Attorneys for Respondent